No. 83-2001

# In the Supreme Court of the United States

**October Term, 1983**

GWELDON LEE PASCHALL AND INTERVENORS,
*Petitioners,*

vs.

THE KANSAS CITY STAR COMPANY,
*Respondent.*

## PETITION FOR REHEARING OF AN ORDER DENYING A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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13 pp

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

### Cases



### Rule



### Other Authorities

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### I.

### INTRODUCTORY STATEMENT

Petitioners respectfully pray, pursuant to Rule 51 of the Supreme Court, for a rehearing of this Court's Order of October 1, 1984, denying a Petition for Writ of Certiorari.

## II.

## REASONS FOR GRANTING THE REHEARING

The United States of America in its motion "as amicus curiae for leave to file an enlarged brief" before the United States Court of Appeals for the Eighth Circuit stated:

> "This appeal involves an important question of antitrust law which has not been authoritatively resolved by the Supreme Court. . . ." (App. 1)

That question is whether practices a monopolist manufacturer uses to distribute its products should be a subject of Federal antitrust law. A question that has not been authoritatively resolved by this Court and it is important that it should be resolved on behalf of Bench, Bar and Business.[1]

The United States of America admittedly did not follow normal policy before filing its amicus brief before the Court of Appeals for the Eighth Circuit and has been considering filing an amicus brief supportive of the Petition for a Writ of Certiorari as it had been requested to do by petitioners. (App. 2-3)

A letter (App. 2-3) from J. Paul McGrath, Assistant Attorney General Antitrust Division, to the Honorable E. Thomas Coleman stated that the division was considering supporting the petition and was dated June 25, 1984. No

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1. "Vertical Arrangements and the Rule of Reason", Frank H. Easterbrook, *Antitrust Law Journal*, Volume 53, Issue 1, 1984, pp. 135-173 at Page 135. "The Chicago School Approach to Single Firm Exercises of Monopoly Power: A Response", Gordon B. Spivak, *Antitrust Law Journal*, Volume 52, Issue 3, 1983, Pages 651 to 674. Areeda, ANTITRUST LAW, 1982 Supplement, Little, Brown and Company, R 729.4C p. 186.

reply of any nature has been received to this request by petitioners.

The United States of America has appeared as amicus in two antitrust cases decided by this Court at this term. *Monsanto Company v. Spray-Rite Service Corporation,* 104 S.Ct. 1464 (March 20, 1984); and *National Collegiate Athletic Assn. v. Board of Regents of the University of Oklahoma,* 104 S.Ct. 2948 (June 27, 1984).

In the *Monsanto* case, the Court applied a "rule of reason" test to vertical resale price maintenance, following *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36 (1977). The effect of which was to affirm uniform holdings of the Supreme Court that the antitrust laws are applicable to vertical restraints. In the matter now before the Court the purpose of respondent in vertically extending its monopoly was to achieve uniform prices at the retail level—the ultimate in resale price maintenance.

In the *NCAA* case, the Court held that "a restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law". P. 2964. The Eighth Circuit en banc majority applied a test of legality based upon a monopolist's preference—the optimum monopoly price theory. This contrasting social and economic approach is not in the public interest and conflicts with the Court's *NCAA* case principles.

This Court in *NCAA* stated "Both per se rules and the Rule of Reason are employed 'to form a judgment about the competitive significance of the restraint.' *National Society of Professional Engineers v. United States,* 435 U.S. 679, 692, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978). 'A conclusion that a restraint of trade is unreasonable may be based either (1) on the nature or character of the con-

tracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions'." Page 2962. The Court went on to reason that the elimination of competition in price or output is an unreasonable restraint of trade.

It is to be noted that on October 1, 1984, this Court invited the United States of America to aid it with its opinion of a jury's findings of per se violations based upon an oil company's monopolistic conduct. *Mobil Oil Corp.*, DKT. 83-1896.

It is likewise imperative that the United States of America be invited to join in presenting herein a full analysis of its views of the application of the antitrust laws to vertical restraints.

It is to be noted that apparent irregularity in the conduct of the United States of America has led to judicial confusion on the part of the en banc majority in the Court of Appeals. This in turn leads to private injury to petitioners in not receiving "equal justice under law" and to public injury in the failure of this Court to authoritatively rule on an admitted important question of antitrust law.

It is respectfully submitted that a rehearing be granted to allow this Court to be informed of the position of the United States of America on this "important question of antitrust law" now before this Court as to how and why it is so important that it be "authoritatively resolved by the Supreme Court". The question raised should be resolved on behalf of Bench, Bar and Business.

## CONCLUSION

For the foregoing reasons, this Court should grant a rehearing of its order denying the Petition for a Writ of Certiorari.

Respectfully submitted,

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## CERTIFICATE OF COUNSEL

As counsel for Petitioners, I hereby certify that this Petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 51 of the Court.

SHERIDAN MORGAN
*Counsel of Record for Petitioners*

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1963

GWELDON LEE PASCHALL, ET AL.,
Plaintiff and Intervenor-Appellees,

v.

THE KANSAS CITY STAR COMPANY,
Defendant-Appellant

**MOTION OF UNITED STATES OF AMERICA AS AMICUS CURIAE FOR LEAVE TO FILE AN ENLARGED BRIEF**

The United States of America, amicus curiae in the above-captioned case, hereby moves this Court for leave to file a 24-page brief in this case.

This appeal involves an important question of antitrust law which has not been authoritatively resolved by the Supreme Court or this Court. A modest enlargement of the 20-page limit for amicus briefs contained in Local Rule 12(f) is necessary to permit a full discussion of the economic and legal analysis relevant to this appeal.

Respectfully submitted,

/s/ Stephen F. Ross
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(Seal)

U.S. Department of Justice
Antitrust Division

*Office of the Assistant Attorney General*

*Washington, D.C. 20530*

[JUN 25 1984]

Honorable E. Thomas Coleman
House of Representatives
Washington, D.C. 20515

Dear Congressman Coleman:

This letter responds to your May 23, 1984, referral to the Department of Justice of correspondence sent to you by the Mid-America Newspaper Carriers Association concerning *Paschall v. Kansas City Star Co.*, 727 F.2d 692 (8th Cir. 1984) (*en banc*). That letter states that Mid-America intends to seek Supreme Court review of the Eighth Circuit's decision and requests that either you or a Committee on which you serve file an *amicus* brief in support of their petition for certiorari.

The issue in the *Kansas City Star* case was whether a monopoly newspaper that decides to distribute its papers to consumers, rather than sell them to other distributors who would resell them to consumers, violates Section 2 of the Sherman Act. As stated in our *amicus* brief, the Department of Justice determined that since the case reveals no anticompetitive effect and some likely consumer benefits, such as lower subscription price and increased circulation, the proposed integration does not violate Section 2. After a rehearing *en banc*, the court of appeals held that the independent contract carriers had not satisfied their burden as plaintiffs in proving that the procompetitive effects generated by direct sale and delivery by Star

Company to subscribers were outweighed by the minimal anticompetitive effect of eliminating potential competition in the retail market.

I regret that prior to the filing of our *amicus* brief, we did not meet with counsel for petitioners. Our normal policy is to meet with counsel for all interested parties in a case in which we are considering *amicus* participtation. Indeed, we have recently discussed this case with counsel for petitioners and we are currently considering their request that the Department of Justice file an *amicus* brief supporting their petition.

I trust this information is responsive to your inquiry and will be of assistance to you. Your interest in this matter, and in our enforcement programs, is greatly appreciated.

Sincerely,

/s/ J. Paul McGrath
J. Paul McGrath
Assistant Attorney General
Antitrust Division